

Dean Kagan's approach to the law and approach to the job of Solicitor General and to get some of her ideas on the law because she is nominated to a critical public policymaking position. I had the so-called courtesy visit with her in my office, which was extensive, as ranking member on the Judiciary Committee. We had an extensive hearing, where I questioned her at some length. Written questions were submitted, and she responded. I was not satisfied with the answers that were given, and when her name came before the committee for a vote, I passed. That means I didn't say yea or nay. I wanted to have her nomination reported to the floor so we could proceed, and I wanted an opportunity to talk to her further. I did so earlier this month. I then wrote her a letter asking more questions and got some more replies. I use the word "replies" carefully because I didn't get too many answers as to where she stood on some critical issues.

During the course of the hearing, we discussed extensively some of her very deeply held positions. The question was raised by me, given those positions, would she be able to take a contrary position on some statute that she is obligated to uphold in arguments before the Supreme Court. She said she would. But the question remains, when you feel so strongly—and the record will show what she had to say—whether you can really make a forceful argument as an advocate. Theoretically, you can. Lawyers are not supposed to necessarily believe in their positions; they are supposed to advocate. The clash and clamor of opposing views in our adversarial system is supposed to produce truth. Lawyers advocate more so than state their own positions. But there is a degree of concern when the views are as strongly held as Dean Kagan's have been.

After the long process I have described, I still don't know very much about Dean Kagan. It is frequently hard, in our separation of powers, for the legislative branch to get much information from the executive branch. We look for information, and frequently we are told it is executive privilege. We are told it is part of the deliberative process or we are simply not told anything, with long delays and no responses.

The legislative branch has two critical pressure points. One pressure point is the appropriations process, to withhold appropriations, which, candidly, is not done very often. It is pretty tough to do that. Another point is the confirmation process where nominations are submitted to us to be confirmed, which the Constitution requires. So there the executive branch has no choice. They can't talk about executive privilege or deliberative process or anything else. But there is a question as to how thorough nominees answers to questions should be.

In discussing what answers we can reasonably expect from Dean Kagan,

the issue of the questioning of judicial nominees is implicated to the extent that the tides have shifted as to how many questions Supreme Court nominees are asked. Not too long ago, there weren't even hearings for Supreme Court nominees. Then the generalized view was that nominations were a question of academic and professional qualifications. Then the view was to find out a little bit about the philosophy or ideology of a nominee but not to tread close to asking how specific cases would be decided. The President is customarily afforded great latitude with nominations. Then Senators look for qualifications, with the generalized view that they don't want to substitute their own philosophy or own approach to the law for the discretion of the President. Some Senators do. There is no rule on it. We may be in a period of transition where some have said the Senate ought to do more by way of utilizing Senators' own philosophical positions in evaluating the President's nominees, that we have as much standing on that front as the President. That is an open question, but I don't propose to suggest the answer to it today or to take a position on it. But it bears on how far we can go in asking Dean Kagan questions.

I don't know very much more about her now than I did when we started the process. From the many questions that I asked her on cases, I have picked out a few to illustrate the problem I am having with figuring out where she stands and the problem I am having with her confirmation. One case of substance and notoriety is a case involving insurance for Holocaust survivors.

The Southern District of New York Federal court held that plaintiffs' monetary claims were preempted by executive policy. The Second Circuit wrote to the Secretary of State and asked for the administration's position on the adjudication of these suits with respect to U.S. foreign policy.

Dean Kagan was asked the question of what was her view on this case. This was a pretty highly publicized case, and it is pretty hard to see how an insurance company ought to be preempted or protected by foreign policy considerations. Well, Dean Kagan didn't tell us very much in her answer. The answer takes up two-thirds of a page, and most of it is about the consultative process, which I am, frankly, not much interested in. I want to know what she thinks about the policy.

She said:

At the end of this process, the decision of the Solicitor General on seeking certiorari is likely to reflect in large measure the views of the State Department as to the magnitude of the foreign policy interests involved.

It does not say very much. I want to know what foreign policy interests she is concerned about.

Another case involving the terrorist attacks captioned "In re Terrorist Attacks on September 11, 2001" where people who were victimized on that day sought damages from Saudi Arabia,

Saudi princes, and a banker, who were alleged to have funded Muslim charities that had provided material support for al-Qaida. The Southern District of New York Federal Court dismissed the plaintiffs' claims on the grounds that the defendants were immune from suit. The Second Circuit affirmed, and the Supreme Court then asked the Solicitor General's Office for its recommendation as to whether to grant the petition for certiorari. There, you have the "tenth" Supreme Court Justice, the Solicitor General, coming into the picture.

Well, when I questioned Dean Kagan on this case, her response was: "I am unfamiliar with this case. . . . A critically important part of this process would be to" work with the clients, the Department of State, and the Department of Justice. And the "inquiry would involve exploration of the purposes, scope, and effect of the Foreign Sovereign Immunities Act, as well as consideration of the role private suits might play in combating terrorism and providing support to its victims."

Well, we do not know very much about her views from that answer. There has been a lot of information in the public domain that Saudi charities were involved. Fifteen of the nineteen hijackers were from Saudi Arabia. People were murdered. There are claims pending in court. The question is whether the Supreme Court is going to take the case. Well, I wish to know what the nominee for the position of Solicitor General thinks about it.

I had calls from people in high positions—I do not want to identify them—saying: Well, don't ask those kinds of questions. Somebody in the executive branch. Well, I am not prepared to relinquish the institutional prerogatives of the Senate to ask questions. The executive branch nominees want confirmation. Well, Senators want information to base their opinions on.

In the case of *Republic of Iraq v. Beatty*, the question was whether Iraq was amenable to suit under the exception to the foreign sovereign immunity clause. American citizens were taken hostage by Saddam Hussein in the aftermath of the first gulf war. They got more than \$10 million in damages. The question, then, is, what would the Solicitor General do? The case is now pending before the Supreme Court. Dean Kagan gives an elongated answer saying very little, virtually nothing:

I have no knowledge of the case and cannot make an evaluation of its merits, even if this evaluation were appropriate (which I do not believe it would be) while the case is pending before the Court with a brief from the Solicitor General supporting reversal.

Well, Dean Kagan has a point as to how much knowledge she has of the case. But when she says that an evaluation is not appropriate while a brief is pending from the Solicitor General supporting reversal—she is not the Solicitor General. She has not submitted the brief. She is not a party to the action. She is a nominee. She wants to be